STATE OF MICHIGAN

COURT OF APPEALS

DANIEL J. TRIERWEILER,

Plaintiff/Counter-defendant-Appellant/Cross-Appellee,

v

VARNUM, RIDDERING, SCHMIDT & HOWLETT, L.L.P.,

Defendant/Counter-plaintiff-Appellee/Cross-Appellant.

UNPUBLISHED
May 2, 2006

No. 256511
Kent Circuit Court
LC No. 98-002188-NM

DANIEL J. TRIERWEILER,

Plaintiff/Counter-defendant-Appellee,

v

VARNUM, RIDDERING, SCHMIDT & HOWLETT, L.L.P.,

Defendant/Counter-plaintiff-Appellant.

No. 261865
Kent Circuit Court
LC No. 98-02188-NM

Before: Bandstra, P.J., and White and Fort Hood, JJ.

PER CURIAM.

These consolidated appeals stem from the same lower court legal malpractice action. In docket number 256511, plaintiff appeals by leave granted from the circuit court's order ruling that, to the extent plaintiff can prove he is entitled to pre-complaint interest as an element of his damages at trial, that interest will be limited to five percent simple interest and may not be compounded. Defendant cross-appeals the circuit court's order denying its motion for partial summary disposition pursuant to MCR 2.116(C)(8) as to plaintiff's claim for damages for fees plaintiff paid to defendants and other attorneys in pursuing tort recoveries against other parties in connection with the underlying loan transaction in which the alleged malpractice occurred, and

as to all aspects of plaintiff's complaint that purport to be based on or refer to an alleged violation of the Michigan Rules of Professional Conduct ("MRPC").

We reverse the circuit court's ruling limiting pre-complaint interest plaintiff may recover to five percent, and its ruling that any interest recovered must be computed simply, and not compounded. As to defendant's cross-appeal, we conclude the circuit court erred in denying defendant's motion to dismiss plaintiff's claim for recovery of investigation and litigation related attorney's fees, and reverse that ruling. We affirm the circuit court's denial of that portion of defendant's motion that sought to dismiss references to the MRPC.

In docket number 261865, defendant challenges the circuit court's order denying its motion in limine, which sought to exclude plaintiff's claim for attorney fees and costs incurred in litigating claims against other alleged tortfeasors involved in the underlying loan transaction. Defendant also challenges the circuit court's determination not to grant a set off for plaintiff's third-party contractual recoveries. We reverse the denial of defendant's motion in limine, and also reverse the circuit court's determination not to grant a setoff.

Underlying Facts

Plaintiff's first amended complaint alleged that plaintiff retained defendant law firm to provide legal advice and services related to a $900,000 loan transaction between plaintiff and Croxton and Trench Holding Corporation, which, together with an earlier $300,000 unsecured loan made to Croxton and Trench by plaintiff (without defendant's involvement), was to be fully secured by Government National Mortgage Association bonds. The complaint further alleged that defendant law firm's investigation of the proposed transaction revealed that the bonds to be pledged as collateral were not owned by Croxton and Trench and that, should Croxton and Trench default on the loans, it could not repay the loans from its assets. Plaintiff also alleged that one of the owners of the bonds, who pledged to unconditionally guarantee the loan to Croxton and Trench and to secure the guarantee with the bonds, was an individual with Texas convictions for securities fraud. Plaintiff alleged that defendant failed to discover this latter information. Plaintiff further alleged that defendant represented to plaintiff that it had completed the appropriate investigation and services necessary to verify the existence and ownership of adequate security and to perfect that security through the loan documents.

Plaintiff closed on the loan on December 1, 1989, in reliance on defendant's advice and services. Plaintiff's complaint alleged that Croxton and Trench defaulted on the loan in January 1990, that the bonds never attached as collateral to secure the loan and, therefore, he was unable to recover the money loaned to Croxton and Trench. Finally, plaintiff alleged that defendant failed to adequately and properly protect his interest in a subsequent lawsuit to recover these funds, such that plaintiff lost any possibility of recovering from various Colorado attorneys, accountants and firms, and was forced to settle with remaining defendants for amounts less than sufficient to cover plaintiff's losses.

Plaintiff's legal malpractice action sought to recover against defendant for failing to ensure that the loan transaction was adequately secured and for its purported negligence in handling the subsequent litigation in Colorado. Plaintiff alleged that, as a result of defendants acts and omissions, among other things: he lost his $900,000 and the use of that money; he lost claims against certain Colorado attorneys, accountants and firms; he paid fees to accountants and

other attorneys to attempt to remedy and mitigate the damages caused by defendant's conduct; and he paid fees to defendant and has been billed for additional fees by defendant that were unearned due to defendant's malpractice.

Defendant counter-claimed, seeking to recover more than $250,000 in unpaid attorney fees allegedly incurred in investigating and litigating against those parties who allegedly had defrauded plaintiff in connection with the underlying loan.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(8), seeking to prevent plaintiff from recovering attorney fees incurred in connection with the loan and subsequent litigation filed to recover (or attempt to recover) some of plaintiff's financial losses following the default on that loan; defendant also sought dismissal of all plaintiff's allegations purportedly based on or referring to the MRPC. The circuit court denied defendant's motion for partial summary disposition as it pertained to plaintiff's references to violations of the MRPC and to plaintiff's claims for attorney fees.[1]

Defendant later filed a motion in limine asking for a ruling that to the extent plaintiff can prove entitlement to pre-complaint interest as an element of his damages, the interest rate should be limited to five percent under MCL 438.31, and any computation methodology for pre-complaint interest may include only simple, and not compound interest. The circuit court concluded that to the extent plaintiff could prove he is entitled to precomplaint interest as a common law element of damages, plaintiff may not claim in excess of five percent, per MCL 438.31, and that the common law permitted only simple interest.

Plaintiff sought leave to appeal this order. This Court granted leave by order entered October 26, 2004. Defendant filed a cross-appeal of the circuit court's order denying its motion for partial summary disposition.

The case continued in the circuit court and defendant filed another motion in limine, this time seeking a ruling that "plaintiff's expenses incurred in his earlier efforts to recover tort damages from others do not constitute proper mitigation expenses" and therefore, cannot be included in plaintiff's claim for damages. The circuit court denied defendant's motion, noting that "we will leave to a later date a court's determination when a more clear factual development is had exactly what damages may be clearly sought by plaintiff from the defendant, if any, with the goal as conceded here that the amount of damage not exceed the actual loss plus interest." Defendant filed an application for leave to appeal this order in this Court (Docket No. 261865); this Court granted defendant's application by order dated July 18, 2005, and consolidated docket numbers 256511 and 261865 on its own motion.

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[1] Defendant sought leave to appeal this order to this Court (Docket No. 248867); this Court denied defendant's application for failure to persuade the Court of the need for immediate appellate review.

The issues whether MCL 438.31[2] applies to limit plaintiff's claim for pre-complaint interest to a rate not to exceed five percent, and whether such interest may be compounded or must be computed simply are questions of law this Court reviews de novo. *Solakis v Roberts,* 395 Mich 13, 19; 233 NW2d 1 (1975). Defendant does not dispute that plaintiff may be entitled to recover pre-complaint interest, if properly proved at trial. The dispute here regards the appropriate rate and whether pre-complaint interest may be compounded annually.

> . . . Michigan has long recognized the common-law doctrine of awarding interest as an element of damages. The doctrine recognizes that money has a "use value" and interest is a legitimate element of damages used to compensate the prevailing party for the lost use of its funds. . . . [T]he pivotal factor in awarding such interest is whether it is necessary to allow full compensation. [*Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 499; 475 NW2d 704 (1991) (citations omitted.)[3]]

Michigan case law addressing whether the usury statute, MCL 438.31, applies "is sparse and inconsistent." See *Manley, Bennett, McDonald & Co v St Paul Fire & Marine Ins Co,* 821 F Supp 1225, 1228 (ED Mich 1993), aff'd 33 F3d 55 (CA 6, 1994). "Usury is, generally speaking, 'the receiving, securing or taking of a greater sum or value for the loan or forbearance of money, goods, or things in action than is allowed by law.'" *Hillman's v Em 'N Al's,* 345 Mich 644, 651; 77 NW2d 96 (1956) (citations omitted). Usury statutes are enacted pursuant to the state's police power for the valid purpose of protecting "necessitous borrowers from extortion." *Wilcox v Moore*, 354 Mich 499, 504; 93 NW2d 288 (1958); *Visioneering Inc Profit Sharing Trust v Belle River Joint Venture*, 149 Mich App 327, 340; 386 NW2d 185 (1986). Michigan's usury statute applies to interest on the loan of money, the forbearance of money, the extension of pre-existing debts and on "all contracts and assurances." *Hillman's, supra* at 651. Usury statutes are in

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[2] MCL 438.31 provides in relevant part:

> The interest of money shall be at the rate of $5.00 upon $100.00 for a year, and at the same rate for a greater or less sum, and for a longer or shorter time, except that in all cases it shall be lawful for the parties to stipulate in writing for the payment of any rate of interest, not exceeding 7% per annum. This act shall not apply to the rate of interest on any note, bond or other evidence of indebtedness issued by any corporation, association or person, the issue and rate of interest of which have been expressly authorized by the public service commission or the securities bureau of the department of commerce, or is regulated by any other law of this state, or of the United States, nor shall it apply to any time price differential which may be charged upon sales of goods or services on credit.

[3] See also *Snow v Nowlin,* 43 Mich 383, 387; 5 NW 443 (1880), and *Banish v City of Hamtramck,* 9 Mich App 381, 400; 157 NW2d 445 (1968).

derogation of the common law, and therefore, are to be strictly construed. *Marion v Detroit*, 284 Mich 476, 484; 280 NW26 (1938).

It is well settled that where a transaction underlying a civil action is contractual in nature, an award of pre-complaint interest is subject to the limitations set forth in MCL 438.31. *Solakis, supra*, 395 Mich 21-22.

Defendant asserts that the same is true for pre-complaint interest in a tort action, relying on *Ehman v Libralter Plastics, Inc*, 207 Mich App 43, 45; 523 NW2d 639 (1994). However, *Ehman* offers no analysis helpful here—it establishes only that precomplaint interest in a conversion case is subject to MCL 438.31.[4]

We agree with plaintiff that *Jaffe v Harris*, 126 Mich App 813; 338 NW2d 228 (1983), rev'd in part 419 Mich 942; 355 NW2d 617 (1984), is controlling. In *Jaffe*, the parties were partners in a limited partnership; the plaintiffs alleged the defendant wrongfully withdrew partnership funds for time periods without paying interest on those funds, wrongfully increased his management fee and wrongfully used partnership money for his own expenses. The plaintiffs also sued the partnership's accounting firm, alleging it was guilty of fraud and malpractice in failing to conduct its audit with due care because it failed to discover or bring to the plaintiffs' attention the defendant's financial wrongdoing. The claims against the accounting firm were dismissed, but the plaintiffs prevailed against the defendant on their management fee claim and on a claim of fraudulent concealment of the defendant's improper withdrawals from partnership funds. The trial court ruled that it had the discretion to award interest as damages on the claim that defendant improperly withdrew partnership funds, utilizing varying rates of interest each year to be compounded annually from the date of the first improper withdrawal. *Id.* at 820. This Court upheld that award, concluding that "each rate of interest utilized was supported by competent evidence" and that the trial court did not exceed its authority by determining that the interest to be paid as damages should be compounded. The Court noted that there was "no indication that the computation of interest utilized here resulted in double recovery." *Id.* at 822.

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[4] In *Ehman*, the defendant was unable to return plastic injection molds to the plaintiff, which were in the defendant's possession and were owned by the plaintiff. The defendant admitted liability for conversion, but contested the amount of damages owed the plaintiff. The trial court ruled that the plaintiff's damages were to be determined by the value of the molds as of the date of conversion and awarded the plaintiff that amount, together with interest from the date of the conversion at a rate based on rates the plaintiff had been paying for personal loans. This Court agreed that the value of the molds at the time of conversion was the proper measure of the plaintiff's damages and that damages in a conversion case "include interest from the date of the conversion"; however, this Court reversed the trial court's determination as to the applicable rate of interest to be applied, concluding that the trial court erred in "failing to award interest in conformity with MCL 600.6013 [the judgment interest statute] . . . and MCL 438.31 [the usury statute]."

In lieu of granting leave to appeal, the Supreme Court ordered that "[t]he judgment of the Court of Appeals dealing with damages for the unauthorized withdrawals is reversed. Plaintiffs may not recover compound interest damages beyond . . . the date on which the first complaint was filed. Thereafter, plaintiffs are entitled to judgment interest pursuant to MCL 600.6013; . . ." *Jaffe, supra,* 419 Mich 942. Thus, the Supreme Court left intact this Court's conclusion that interest awarded to the plaintiffs at a variable rate was appropriate if supported by proofs. See also, *Manley, Bennett, McDonald & Co v St Paul Fire & Marine Ins Co,* 821 F Supp 1225, 1228 (ED Mich 1993), aff'd 33 F3d 55 (CA 6, 1994).

Following *Jaffe, supra,* we reverse the circuit court's determination that any award of pre-complaint interest in this case be limited to the rate provided by MCL 438.31. Rather, the appropriate rate should be determined as a matter of fact based on proofs presented at trial.

B

The circuit court also determined that any award of pre-complaint interest was to be computed simply and not compounded, agreeing with defendant that the common law does not permit interest to be compounded unless permitted by statute, authorized by a contract between the litigating parties or where necessary to ensure that a willful wrongdoer does not profit from the wrongdoing. We disagree.

The common law favors simple interest and disfavors the compounding of interest, allowing it only where authorized by statute or explicit agreement of the parties, or where compelled by the presence of some special circumstances, such as "peculiar relations between the parties or the fraudulent conduct of the debtor" or in actions in equity where necessary to achieve a just and equitable result. *Nation v WDE Elec Co,* 454 Mich 489; 563 NW2d 233 (1997); *Norman v Norman,* 201 Mich App 182, 186-187; 506 NW2d 254 (1993). However, neither of these cases nor any other Michigan case has addressed whether pre-complaint interest is to be computed simply, or whether it may be compounded as appropriate to fully compensate an injured party.

In *Nation, supra,* 454 Mich 494, the Court determined, as a matter of statutory interpretation, that the reduction of future damages to present cash value under MCL 600.6306 is to be calculated using simple interest methodology. In *Norman, supra,* the parties' consent judgment of divorce provided that the plaintiff was to have a lien on the marital home in the amount of $14,000, which was to accrue interest at 8 ¾ % per annum from the date the judgment entered, and which was to become due and payable upon the happening of certain events. Upon the occurrence of one of those events, a dispute arose as to whether the interest was to be calculated simply or compounded annually. The trial court determined that the interest was to be compounded annually; this Court reversed, concluding that because neither the consent judgment nor any statute specifically provided for compound interest and there were no special circumstances warranting deviation from the general rule, the consent judgment "must be construed as providing for the payment of simple interest rather than compound interest." *Norman, supra,* 201 Mich App 183-184, 187, 189. Thus, while both *Nation* and *Norman* articulate the general rule in favor of simple interest, neither addresses whether pre-complaint interest may be compounded in this legal malpractice action.

The other cases defendant cites as requiring that only simple interest be available to plaintiff in this case, *Gage v Ford Motor Co*, 423 Mich 250; 377 NW2d 709 (1985), and *Schwartz v Piper Aircraft, Corp*, 90 Mich App 324; 282 NW2d 306 (1979), are also inapposite. In *Gage*, the Court addressed the effect of the 1980 amendments to the judgment interest statute on claims filed before the amendment but resolved after the date stated therein. The Court determined that the compounding of interest under MCL 600.6013 was not permitted before the date specifically provided in the amendments. *Id.* at 259-260. Nothing in *Gage* purports to address, or relates to, the computation of interest as a matter of pre-complaint, common-law damages. In *Schwartz*, this Court noted recognized that that case "only concerned" whether the judgment interest statute, MCL 600.6013, provided for simple or compound interest and expressly did not address interest awarded by the jury as a common law element of damages.[5]

The Supreme Court's order in *Jaffe, supra*, 419 Mich 942, allowed compound interest before, but not after the complaint was filed. The *Jaffe* order states that the "[p]laintiff may not recover compound interest damages beyond . . . the date on which the complaint was first filed"[6] and it left intact this Court's affirmance of the trial court's compounding of pre-complaint interest. See also *Manley, supra*, 821 F Supp 1228, in which the court, applying Michigan law, awarded the plaintiff pre-complaint interest to be compounded annually. *Id.*, at 1229.[7]

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[5] Defendant asserts that *Schwartz*, "squarely addressed and rejected" the argument that compounding should be allowed in every case because simple interest may fail to fully compensate the prevailing party for his losses. Contrary to this assertion, this Court expressly stated that it was not dealing with the recovery of precomplaint interest as a part of damages in *Schwartz*, and the issue in *Schwartz* was whether the judgment interest statute in effect at that time provided for simple interest.

[6] In a prior appeal in *Jaffe*, the resolution of which is reported at 109 Mich App 786; 312 NW2d 381 (1981), the plaintiffs filed their complaint before June 1, 1980. Before June 1, 1980, MCL 600.6013 provided for only simple postcomplaint interest; thereafter postcomplaint interest was to be compounded annually. *Gage*, 423 Mich 252.

[7] In so doing, the *Manley* court explained:

> The general American rule appears to be that common law interest cannot be compounded unless authorized by statute. See 22 Am.Jur.2d, Damages § 650. Nevertheless, at least one recent Michigan case allowed compound interest to stand. *Jaffe, supra* [126 Mich App 813; 338 NW2d 228 (1993), rev'd in part, lv den in part, 419 Mich 942; 335 NW2d 617 (1984)].
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> The general purpose behind awards of pre-complaint interest was discussed by the Michigan Supreme Court in *Gordon Sel-Way, Inc. v. Spence Brothers, Inc.*, 438 Mich. 488, 499, 475 N.W.2d 704 (1991). "[T]he pivotal factor in awarding such interest is whether it is necessary to allow full compensation." *Id.* My job as fact finder in this case is to award plaintiff a sum of money that reflects not only its exact dollar expenditures, but also any additional value

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Applying *Jaffe, supra*, we conclude that the circuit court erred in ruling that Michigan's usury statute, MCL 438.31, applies to limit plaintiff's claim for pre-complaint interest on the lost use of his money in this legal malpractice action. The circuit court further erred in determining that pre-complaint interest may not be compounded in this case as a matter of law. If plaintiff's proofs at trial establish that defendant was deficient in its representation during the loan transaction, he is entitled to an award of damages sufficient to fully compensate him for his resulting losses. If the proofs establish that a rate in excess of five percent or the compounding of interest is necessary to do so, such an award is not barred as a matter of law.

II – Cross-Appeal in Docket No. 256511

On cross-appeal, defendant contends that the circuit court should have dismissed the portion of plaintiff's first amended complaint that purports to be based on alleged violations of the Michigan Rules of Professional Conduct (MRPC). We disagree.

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> plaintiff could have derived from the use of that money for its own purposes. Just as future damages are reduced to present value, so past ascertainable damages should be increased to present value. Whether or not compound interest is needed to accomplish this goal is a question of fact. Without adequate interest, plaintiff cannot be made whole, and defendant would be unjustly enriched.
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> In the modern business world compound interest is commonplace. Several cases have recognized the importance of awarding compound interest in other situations. *Johns-Manville Corp. v. Guardian Industries Corp.*, 718 F.Supp. 1310 (E.D.Mich.1989), involved calculation of pre-complaint interest on royalties in a patent infringement case. The court concluded: "Because interest 'serves to make the patent owner whole,' [*General Motors Corp. v.*] *Devex* [*Corp.*], 461 U.S. [648] at 656, 103 S.Ct. [2058] at 2062 [76 L.Ed.2d 211 (1983)] the Court finds that annual compounding, rather than simple interest, is proper." Accord, *American Anodco, Inc. v. Reynolds Metals Co.*, 572 F.Supp. 895, 896 (W.D.Mich.1983).
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> Michigan cases that deny awards of compound interest all involve statutory, rather than common law, interest. In *Schwartz v. Piper Aircraft Corp.*, 90 Mich. App. 324, 282 N.W.2d 306 (1979), the court of appeals reversed a lower court ruling that required the defendant to pay compound *judgment* interest. The ruling was made at a time when M.C.L. § 600.6013 did not specifically provide for compound interest, as it does now. Judgment interest, unlike pre-complaint interest, has always been purely statutory. *Matich v. Modern Research Corp.*, 430 Mich. 1, 420 N.W.2d 67 (1988). Therefore, the judgment interest statute is in derogation of the common law and must be strictly construed. But pre-complaint interest as an element of damages is *not* in derogation of the common law. The only constraining factors are the common law itself and the need to fully compensate plaintiff. [*Id.*, at 1228.]

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank,* 468 Mich 557, 561; 664 NW2d 151 (2003). Defendant relies on MRPC 1.0(b), which provides:

> Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The rules do not, however, give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with an obligation or prohibition imposed by a rule. In a civil or criminal action, the admissibility of the Rules of Professional Conduct is governed by the Michigan Rules of Evidence and other provisions of law.

A violation of the rules cannot "give rise" to a cause of action for enforcement or for damages caused by a failure to comply, as this Court noted in *Watts v Polaczyk,* 242 Mich App 600, 607 n1; 619 NW2d 714 (2000). However, it does not follow that the rules are irrelevant for all purposes.

Defendant argues that, pursuant to MRPC 1.0(b), a violation of an ethical rule does not create any presumption of malpractice, and further is inadmissible as evidence or in argument in a legal malpractice case. Defendant cites cases from other jurisdictions and legal treatises in support of its argument. Defendant points out that the prior Code of Professional Responsibility contained no prohibition like that set forth in MRPC 1.0(b), and therefore, that this Court's decisions that a violation of the Code constituted a rebuttable presumption of negligence do not apply to violations of the MRPC. Plaintiff argues that his claim for malpractice is not based on any violation of the ethical rules and does not seek to enforce any rule, both of which are prohibited by MRPC 1.0(b); rather he relies on the third sentence of MRPC 1.0(b) – providing that admissibility of the rules in a civil case shall be determined by the rules of evidence.

We conclude that the circuit court did not err in denying defendant's motion to strike references to the MRPC in plaintiff's complaint or at trial. Certainly, violations of the MRPC cannot form the basis for an action for malpractice; they do not establish any presumption of negligence. However, the MRPC are admissible as evidence in a malpractice action, where they are relevant to the alleged deficient conduct at issue and where their probative value is not outweighed by their prejudicial effect. Plaintiff asserts that the MRPC are relevant to the scope of defendant's duty to plaintiff and as to whether defendant met the applicable standard of care. Defendant does not argue that the prejudicial effect of the rules outweigh their probative value in the instant case. Therefore, we affirm the circuit court's denial of defendant's motion.

III

On cross-appeal, defendant also contends that the circuit court should have dismissed plaintiff's claim for recovery of investigation and litigation related attorney fees paid to defendant that were unearned because of defendant's malpractice, as well as fees paid to other attorneys in an attempt to mitigate the damages caused by defendant's malpractice. We agree.

Whether plaintiff is entitled to recover attorney fees and costs incurred in investigation and litigation following the loan transaction is a question of law. This Court reviews questions of law de novo. *Bennett v Weitz,* 220 Mich App 295, 299; 559 NW2d 354 (1996).

We agree with defendant that plaintiff is not entitled to recover any attorney fees expended - whether paid to defendant or to others – in investigation and litigation subsequent to the failed loan transaction. To recover such fees "[t]he wrongdoer must be guilty of malicious, fraudulent or similar wrongful conduct, rather than negligence", *Mieras v DeBona*, 204 Mich App 703, 709-710; 516 NW2d 154 (1994), rev'd on other grounds, 452 Mich 278; 550 NW2d 202 (1996)[8], see also *Bonner v Chicago Title Ins Co,* 194 Mich App 462, 468-469; 487 NW2d 807 (1992). In the instant case, plaintiff alleges that defendant committed professional negligence in its representation of him during the loan transaction; he has not asserted that defendant's conduct was malicious, fraudulent or otherwise similarly wrongful. Therefore, plaintiff is not entitled to recover attorney fees from prior litigation undertaken to address the results of defendant's alleged malpractice and the circuit court erred in denying defendant's motion in limine in this respect.[9]

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[8] The defendant in *Mieras, supra,* was alleged to have negligently drafted the decedent's will. The plaintiffs, two of decedent's children, were forced to defend an action brought by another of decedent's children contesting the will; in the attorney negligence action, the plaintiffs alleged that the defendant failed to properly revise the will to effectuate the decedent's intent and that he negligently supervised the execution of the will, leading to the costly will contest. This Court agreed that the defendant owed the plaintiffs a duty as named beneficiaries of the will; however, the Court upheld the trial court's determination that the plaintiffs were not entitled to recover attorney fees incurred in the will contest litigation. This Court explained:

> Generally, awards of costs or attorney fees are not allowed unless expressly authorized by statute or court rule. *State Farm Mutual Automobile Ins Co v Allen,* 50 Mich App 71, 74; 212 NW2d 821(1973). However, a party may recover as damages the costs, including attorney fees, expended in a prior lawsuit he was forced to defend or prosecute because of a third party's wrongdoing. *Bonner v Chicago Title Ins Co,* 194 Mich App 462; 487 NW2d 807 (1992). The wrongdoer must be guilty of malicious, fraudulent or similar wrongful conduct, rather than negligence. *G & D Co v Durand Milling Co, Inc,* 67 Mich App 253, 259-260; 240 NW2d 765 (1976).
>
> Plaintiffs have alleged only negligence, not fraud or malice in defendant's execution of his legal services for [the decedent]. As a consequence, their claim for the costs of defending against . . . [the] will challenge fails. [*Id.,* at 709-710.]

The defendant in *Mieras* appealed to the Supreme Court, which agreed with this Court that the plaintiffs could bring a tort-based cause of action against the defendant for negligent breach of the standard of care owed them by nature of their third-party beneficiary status, but reversed this Court's reinstatement of the plaintiffs' complaint on the basis that the will fulfilled the intent of the testator as expressed therein.

[9] For the sake of clarity, we note that while plaintiff argued below, and argues again on appeal, that pursuant to MCL 600.2912(2), defendant's alleged malpractice is a defense to defendant's counterclaim for unpaid fees and that he is entitled to recoup attorney fees he paid to defendant
(continued…)

IV – Docket No. 261865

In Docket No. 261865, defendant asserts that plaintiff cannot recover attorney fees expended in seeking or obtaining litigation recoveries against other alleged third-party tortfeasors who caused the loss underlying this case, because those fees were not incurred in the avoidance of any loss, but rather to repair past damages, the incurring of the fees was motivated by revenge and personal animosity toward those parties and not any intent to mitigate, and as a matter of law, any recoveries obtained from the third-parties cannot be used to reduce the damages plaintiff may seek to recover from defendant.

Whether costs incurred in litigation against parties other than the defendant constitute "mitigation" expenses is a question of law. This Court reviews such questions de novo. *Bennett, supra*, 220 Mich App 299.

Generally, whether in contract or tort, an injured party "must make every reasonable effort" to minimize the damages they suffer. *Williams v American Title Ins Co*, 83 Mich App 686, 697; 269 NW2d 481 (1978); *Bak v Citizens Ins Co*, 199 Mich App 730, 736; 503 NW2d 94 (1993). The doctrine of mitigation entitles a defendant to some measure of protection against unnecessary loss suffered by a plaintiff. *Morris v Clawson Tank Co*, 459 Mich 256, 265; 587 NW2d 253 (1998).

Plaintiff argues that expenses he incurred in investigating and bringing suit against other participants in the loan transaction were incurred in a reasonable attempt to mitigate his damages resulting from defendants' negligence. However, contrary to this characterization, plaintiff's actions in investigating and bringing suit against other parties involved in the loan transaction were taken to *recover* the portion of his losses attributable to the conduct of those parties and not to *avoid* any further unnecessary loss resulting from defendant's conduct. That is, plaintiff's litigation against other parties did nothing to "minimize the economic harm," to "conserve the economic welfare" of the community, or to protect against any unnecessary loss *arising from defendant's alleged wrongdoing*. Therefore, costs incurred in connection with this litigation do not constitute mitigation expenses and the circuit court erred in not so ruling.

We conclude that the circuit court erred in denying defendant's motion in limine to exclude plaintiff's claim for attorney fees and costs incurred in litigating claims against other alleged tortfeasors involved in the underlying loan transaction. Such expenses were not incurred in mitigating the damages allegedly caused by defendant's conduct, but rather were incurred in attempting to recover from those alleged tortfeasors the portion of plaintiff's damages that were attributable to their alleged wrongdoing.

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for services during which the alleged malpractice occurred, defendant has not asserted otherwise and this issue is not before this Court at this time.

V

Defendant also contends that the circuit court erred in not granting a set-off for plaintiff's third-party contractual recoveries – as distinguished from the tort recoveries – as such recoveries do not come within the parameters of tort liability statutes.

Whether defendant is entitled to a set-off for contract-based recoveries received by plaintiff is a question of law this Court reviews de novo. *Bennett, supra,* 220 Mich App 299.

Defendant asks this Court to declare that it is entitled to a set-off of any recoveries obtained by plaintiff on the loan documents themselves; that is, for any "contract-based" or "transaction based" recoveries from other parties connected to the loan transaction. Defendant also asks this Court to determine that certain recoveries were in fact contract based. The former question, which presents an issue of law, is properly before this Court and is ripe for resolution. The circuit court, however, has not decided the latter question, and we conclude that the record is insufficient to allow this Court to address it.

As this Court observed in *Grace v Grace,* 253 Mich App 357, 368-369; 655 NW2d 595 (2002):

> Generally, under Michigan law, only one recovery is allowed for an injury. To determine whether a double recovery has occurred, this Court must ascertain what injury is sought to be compensated. Thus, where a recovery is obtained for any injury identical with another in nature, time, and place, that recovery must be deducted from the plaintiff's other award. [Citations omitted.]

In *Grace,* the plaintiff sued her divorce attorney for malpractice. While that case was pending, the plaintiff filed suit against the defendant, her former husband, for fraud, on the basis that the defendant concealed and/or undervalued substantial marital assets before the parties entered into a separation agreement, which included a valuation of the plaintiff's share of the marital estate. The plaintiff settled the case against her attorney and obtained a substantial jury verdict in her favor against the defendant. The trial court granted the defendant a set off against the verdict for the plaintiff's malpractice settlement. This Court affirmed, explaining:

> In the present case, plaintiff sought damages against defendant for fraudulently concealing certain marital assets and for failing to disclose the true value of other disclosed assets. Here, plaintiff's claim arises out of the separation agreement that was later incorporated into the divorce judgment. Likewise, plaintiff's legal malpractice claim against her divorce attorney sought damages for his alleged failure to discover the assets that defendant had concealed and determine the true value of the disclosed assets. . . .
>
> We conclude that plaintiff has sought to recover damages for an injury identical in nature, time, and place against both defendant and her divorce attorney. This is especially so where the legal malpractice action arises out of plaintiff's claim that defendant fraudulently concealed certain marital assets and undervalued marital assets that were disclosed. Therefore, to make plaintiff whole in either case she must receive half the value of the marital estate at the time of the divorce. See, e.g., *Coleman v Gurwin,* 443 Mich 59, 63-64; 503

> NW2d 435 (1993), quoting *Basic Food Industries, Inc v Grant*, 107 Mich App 685, 691; 310 NW2d 26 (1981) (the recovery sought in a legal malpractice case is usually the value of the claim of the suit in the proceeding in which the negligent act occurred if the client was a plaintiff in the action, or the amount of the judgment imposed if the client was a defendant).

Similarly, in *Great Northern Packaging Inc v General Tire & Rubber Co*, 154 Mich App 777, 779-780; 399 NW2d 408 (1986), the plaintiff and the defendant entered into a blanket purchase order; thereafter one of the plaintiff's salesman left plaintiff's employ and went to work for a competitor. The competitor then offered to sell the defendant a similar product at a lower price. The plaintiff filed suit against the defendant for breach of contract and unjust enrichment, and against the competitor, alleging unfair competition, tortuous interference with contractual relation and unjust enrichment. The plaintiff ultimately accepted a mediation award against the competitor and obtained a jury verdict in its favor against the defendant. This Court upheld the trial court's allowance for a setoff of the mediation award against the verdict, explaining that a set off was appropriate to the extent that the mediation award duplicated the verdict. *Id.*, at 783-784.

We conclude that, here as in *Grace*, any transaction-based recoveries plaintiff has obtained from other parties – such as from a guarantor of Croxton and Trench's debt, for example – are properly set off against any verdict or judgment ultimately obtained against defendant in this action, because they compensate plaintiff for an injury identical in nature, time and place – the loss of plaintiff's funds as a result of Croxton and Trench's default on the underlying loan.

Plaintiff argues that the Legislature eliminated the right to set-off for *any* recovery when it amended MCL 600.2925d[10] to eliminate set-offs and to remove any reference to tortfeasors therein, replacing all such references with the generic term "person", thereby broadening the coverage of the provision to prohibit any and all set-offs for any and all injuries. We acknowledge that the 1995 amendments to MCL 600.2925d removed references to "tortfeasors," as well as a specific reference to persons "liable in tort." See Effect of Amendment notes,

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[10] MCL 600.2925d provides:

> If a release or a covenant not to sue or not to enforce judgment is given in good faith to 1 of 2 or more persons for the same injury or the same wrongful death, both of the following apply:
>
> > (a) The release or covenant does not discharge 1 or more of the other persons form liability for the injury or wrongful death unless its terms so provide.
> >
> > (b) The release or covenant discharges the person to whom it is given from all liability for contribution to any other person for the injury or wrongful death.

following MCL 600.2925d.[11] However, we note that MCL 600.2925a specifically speaks in terms of persons jointly liable *in tort*, that MCL 600.2925b addresses determining the pro rata share of liability among joint *tortfeasors*, that MCL 600.2925c addresses the enforcement of contribution among two or more *tortfeasors*, and that MCL 600.2925d addresses the effect of a release, covenant not to sue or covenant not to enforce a judgment, given in good faith, to "1 of 2 or more persons for the same injury or the same wrongful death." Thus, considered in context, MCL 600.2925d does not operate to prevent the set off of transaction-based recoveries of the underlying debt. Such recoveries are not setoffs in the sense that they compensate for the loss. Rather, they diminish the actual amount of damages. We conclude that any monies recovered by plaintiff based on documents prepared by defendant in the underlying loan transaction, must be credited against any damages that might be awarded against defendant in this malpractice action.

In Docket No. 256511, we reverse the portion of the circuit court's order limiting plaintiff's claim for pre-complaint interest to five percent simple interest; affirm the circuit court's denial of defendant's motion to dismiss the portion of plaintiff's complaint that refers to the MRPC, and reverse the circuit court's denial of defendant's motion to dismiss plaintiff's claim for recovery of attorney fees and costs incurred in post-transaction litigation.

In Docket No. 261865, we reverse the court's order denying defendant's motion in limine which sought to exclude plaintiff's claim for attorney fees and costs incurred in litigating claims against other alleged tortfeasors involved in the underlying loan transaction. We also reverse the circuit court's determination not to grant a set off, as discussed herein.

/s/ Richard A. Bandstra
/s/ Helene N. White
/s/ Karen M. Fort Hood

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[11] Before 1995, MCL 600.2925d provided:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to 1 or 2 or more persons liable in tort for the same injury or the same wrongful death
>
> > (a) It does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide.
> >
> > (b) It reduces the claim against the other tort-feasors to the extent of any amount stipulated by the release or the covenant or to the extent of the amount of the consideration paid for it, whichever amount is the greater.
> >
> > (c) It discharges the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor.